Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MATSUSHITA ELECTRIC COMPANY and
TOKIO MARINE & FIRE INSURANCE COMPANY,

Petitioners,

vs.

JOHN ZIEGLER, a Customs Agent,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the long-standing right to bring a property damage action against a negligent United States Customs Officer, recognized by this Court in *Kosak v. United States*, 465 U.S. 848 (1984) and acknowledged subsequently by this Court in *Gutierrez De Martinez v. Lamagno*, 515 U.S. __, 132 L. Ed. 2d 1995 has survived the passage of the *Liability Reform Act*, 28 U.S.C. § 2679.

STATEMENT PURSUANT TO RULE 29.6

Matsushita Electric Company:

(a) Panasonic Factories Automation Division (PFA), is a corporation existing and incorporated under the laws of the State of Delaware, is a subsidiary of Matsushita Electric Corporation of America, and has no nonwholly owned subsidiaries.

(b) Matsushita Electric Corporation of America is a corporation existing and incorporated under laws of the State of Delaware, is a subsidiary of Matsushita Electric Company, and has no nonwholly owned subsidiaries.

(c) Matsushita Electric Company has no parent company, nor any nonwholly owned subsidiaries.

Tokio Marine & Fire Ins. Co. has no parent company, nor any nonwholly owned subsidiaries.

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Petitioners, Matsushita Electric Company and Tokio Marine & Fire Insurance, respectfully pray that a Writ of Certiorari issue to review the Judgment Order of the Eleventh Circuit Court of Appeals entered October 27, 1998, affirming the District Court's substitution of the United States as the party Defendant for Defendant John Zeigler, a United States Customs Agent, and subsequent granting of the United States' Motion to Dismiss, and in support thereof represent as follows:

OPINIONS BELOW

The opinion of the United States Court of Appeals in the Eleventh Circuit is reported *at Matsushita Electric Company, et al. v. John Zeigler*, 158 F.3d 1167 (11th Cir. 1998) (App. A).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 27, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346 (App. C);
28 U.S.C. § 1499 (App. B);
28 U.S.C. § 2006 (App. D);
28 U.S.C. § 2679 (App. E);
28 U.S.C. § 2680 (App. F).

STATEMENT OF THE CASE

Petitioners Matsushita Electric Company ("Matsushita") and its insurers brought this action against Respondent John Zeigler, a United States Customs Officer. The basis for the action was that Mr. Zeigler was negligent in failing to safeguard Matsushita's computer chip mounting machine following a United States Customs inspection, during which the machine was removed from its protective package. Jurisdiction in the District Court was based on 28 U.S.C. § 1332.

In *Kosak v. United States*, 465 U.S. 848 (1994), this Court acknowledged the long-standing right of a property owner to bring an action against a United States Customs Officer whose negligence caused damage to his property. *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146 (2d Cir. 1974) and *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). Following passage of the *Liability Reform Act*, 28 U.S.C. § 2679, this Court, in *Gutierrez De Martinez v. Lamagno*, 515 U.S. __, 132 L. Ed. 2d 375 (1995), again acknowledged the right to seek damages for a Customs Officer's negligence. Conversely, the Eleventh Circuit in this case held that the by passage of the *Liability Tort Reform Act* Congress eliminated this right which had existed since the early 1800s. Thus, the fundamental question is whether this cause of action has survived passage of the Act.

A. Factual Background (Proceedings Below)

In 1994, Petitioner Matsushita purchased a computer chip mounting machine in Japan. Matsushita, which had routinely imported similar machines without interference/inspections from United States Customs inspectors had sold the machine to OKI Telecom, Suwanee, Georgia. To protect the sensitive metal components from the high humidity environment, the manufacturer had enveloped the machine with a vacuum seal.

The machine was then crated and transported from Japan to Atlanta in an ocean container.

Without providing any explanation for his actions, Respondent Zeigler, a United States Customs Officer, decided to inspect the machine at Hartsfield Warehouse Co., a United States Customs Container Examination Station in Atlanta. He instructed the warehouse personnel to break the vacuum seal. Although finding no contraband, he withheld United States Customs clearance until Matsushita could determine the value of a tool kit and a parts manual.

Respondent took no means to safeguard the machine from Atlanta's high humidity during the time that the machine awaited clearance. As a result, the machine sustained atmospheric rust, which damaged the sensitive machine beyond repair.

Inasmuch as Respondent Zeigler was acting within the scope of his statutory authority to inspect the machine (19 U.S.C. § 1499), Matsushita had no cause of action against the United States under the *Federal Tort Claims Act*, 28 U.S.C. § 2680. However, since the early 1800s, property owners have had the right to sue a United States Customs Officer for damage caused by his/her negligence. *Kosak v. United States*, 465 U.S. 848 (1984). Pursuant to 28 U.S.C. § 2006, the successful party could satisfy the judgment through the United States Treasury. Accordingly, Petitioners proceeded under this theory.

B. The Proceeding Below

Based on its interpretation of this Court's opinion in *United States v. Smith*, 499 U.S. 160 (1991) and on its interpretation of the *Federal Employees Liability Reform and Tort Compensation Act*, (*Liability Reform Act*), 28 U.S.C. § 2679,

the District Court granted Respondent Zeigler's Motion to Substitute the United States as party Defendant and then granted the United States' Motion to Dismiss based upon the *Federal Tort Claims Act*. The Eleventh Circuit Court of Appeals affirmed. Although acknowledging that the right to sue a United States Customs Officer had existed over the years, the Eleventh Circuit Court held that it did not survive the passage of the *Liability Reform Act*.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH OPINIONS OF THIS COURT AND, FURTHERMORE, HAS MISINTERPRETED THE INTENT OF THE LIABILITY REFORM ACT, *i.e.*, TO PRESERVE RECOGNIZED REMEDIES THAT HAD EXISTED OUTSIDE THE REACH OF THE FTCA.

The basis of the Eleventh Circuit Court of Appeals' opinion was that, by enactment of the *Liability Reform Act*, 28 U.S.C. § 2679, Congress had eliminated the longstanding right to sue a negligent United States Customs Officer causing damage to a property owner. *Matsushita Electric Company v. Zeigler*, 158 F.3d 1167, 1171 (11th Cir. 1998). Thus, the decision conflicts with the congressional intent of the *Liability Reform Act*. Moreover, given this Court's statements in *Gutierrez DeMartinez v. Lamagno*, 515 U.S. __, 132 L. Ed. 2d 375 (1995) about the continued viability of actions against United States Customs Officers, this important question should be settled by this Court.

The express purpose of the *Liability Reform Act* was Congressional response to this Court's opinion in *Westfall v.*

Erwin, 484 U.S. 292 (1989) (establishing a qualified immunity for United States employees in *FTCA* related cases.) To remedy this result, Congress made the *FTCA* the exclusive remedy for those cases which fell within its purview. However, by passage of the Act, Congress did not intend to eliminate recognized causes of action against individual United States Customs Officers. Cited by the dissent in *United States v. Smith*, 499 U.S. 160 (1991), the U.S. Justice Department's comments on the statutory intent are relevant. As the *Smith* dissent noted from the reports:

> The point was reiterated by others during the hearings and debate. *See id.*, at 34 ('in no way, in no way at all, does this measure infringe or diminish any legal rights of individuals') (statement of Rep. Wolf); *Id.*, at 44.

The *Smith* dissent's notation was and is consistent with the following passage taken from the Legislative History of the *Liability Reform Act* found in the House Reports:

> The purpose of H.R. 4612 is to provide that such actions for money damages proceed against the United States under the FTCA. The technical amendment to amend section 2679(b)(a) of title 28 makes it clear that an injured person retains the right to seek injunctive or other appropriate equitable relief against either the United States or the Federal employee. The technical amendment to amend section 2679(b)(2) of Title 28 makes it clear that the changes made by this Act do not alter either express or implied statutory rights of action for injunctive relief or damages under the usual rules of construction applied by the Supreme Court in such cases as: *Cort v. Ash*, 422 U.S. 66 (1975); *Piper*

> *v. Chris-Craft Industries*, 430 U.S. 1 (1977); and *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11 (1979). Clearly, H.R. 4612 does not change the law, as interpreted by the courts, with respect to the availability of other recognized causes of action; nor does it either expand or diminish rights established under other Federal statutes.

1988 Cong. and Admin. News p. 5951.

As this Court had confirmed previously in *Kosak v. United States*, 465 U.S. 848 (1984), a property owner had a right to "bring suit against an individual customs officer who negligently damaged his goods." 465 U.S. at 860. At footnote 20 in the *Kosak* opinion, this Court referred to a 1832 article by J. Story, *Commentaries on the Law of Bailments*, for the proposition that the right had existed from the early 1800s. In the *Kosak* decision, this Court also acknowledged early Federal Appellate Court decisions which had particularly recognized the common law right to sue United States Customs Inspectors, *e.g.*, *States Marines Lines Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974). In an 1895 case, for example, *Hendricks v. Gonzalez*, 67 F. 351 (2d Cir. 1895), the collector of United States Customs for the Port of New York refused clearance to a vessel and its cargo. Proceeding under a predecessor to 28 U.S.C. § 2006 (Rev. St. U.S. § 995), the vessel owner brought an action against the collector, Francis Hendricks, and sought to recover against the United States. The court commented on the purpose of the statute. As it stated:

> When a recovery is had in any suit against a collector or other officer of the revenue for any act done by him in the performance of his official duty, and the Court certifies that he acted under the directions of the secretary of the treasury, no execution shall

> issue, but the amount recovered shall be paid by the treasury. It was to provide for a case like the present that this statute was enacted and the statute would have been wholly unnecessary except that the order of a superior officer is no defense to an inferior for the unlawful performance of an official act.

Hendricks, 67 F. at 353. This peculiar right to sue a Customs Officer then obviously existed prior to enactment of the *FTCA*, and the *Liability Reform Act*. *See also Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944) (an action, in part, against the collector of customs, H. Durning, for conversion of the Plaintiff's medicinal tonic).

The rationale of these early courts in allowing actions against Customs Officers is as equally compelling today, as it was in 1895. For example, as the *Shultz* Court stated, such an action against the individual United States Customs officer was not considered to be against the Sovereign. *States Marine Lines, Inc. v. Shultz*, 498 F.2d at 1149, n.2. Furthermore, that Court also observed, and, as *Kosak* confirmed, satisfaction of the judgment was to be accomplished through the United States Treasury, 28 U.S.C. § 2006. Moreover, as previously stated, both the right to sue a United States Customs Officer and the satisfaction of a judgment by application of 28 U.S.C. § 2006 was subsequently determined to be consistent with the intent of the *FTCA*. *Kosak v. United States*, 465 U.S. at 860. Clearly then, there must be clear and unequivocal Congressional intent to eliminate such a long-standing remedial scheme. There is no such stated intent in the *Liability Reform Act*.

The significance of the comments from *Kosak* and from the legislative history of the *Liability Reform Act* is that the cause of action against a negligent United States Customs Officer is one that not only antedated the passage of *FTCA*, but

also was considered the subject of an FTCA exception — § 2680(c). In that respect, this Court in *Hatzlach Supply Co. v. United States*, 444 U.S. 460, 464 (1980) observed that Congress in creating these exceptions in the *FTCA*, was aware that "other laws provided the machinery for these claims". Likewise, this Court stated also in *Kosak*, one of the purposes in creating § 2680(c) was in "not extending the coverage of the Act to suits for which adequate remedies were already available." 465 U.S. at 858.

Clearly then, the remedial scheme presented by *Kosak* is not inconsistent with either the *FTCA* or the *Liability Reform Act*. Indeed, it essentially provides the same protection to United States Customs Officers. Given the fact that Congress did not wish to eliminate existing remedies with passage of the *Liability Reform Act*, the Eleventh Circuit Court of Appeals erred in holding that by passage of the Act, Congress eliminated actions against United States Customs Officers.

The protection afforded United States Customs Officers under the *Kosak* remedial scheme turns upon 28 U.S.C. § 2006, which is entirely consistent with § 2680 of the *FTCA*. 28 U.S.C. § 2680(c) created exemptions from the waiver of sovereign immunity otherwise created by enactment of the *FTCA*. Commenting on the purpose of § 2680(c), in *Kosak* in this Court observed:

> Of perhaps greater importance than these two clues as to the meaning of the prepositional phrase contained in § 2680(c) is the fact that our interpretation of the plain language of the provision accords with what we know of Congress' general purposes in creating exceptions to the Tort Claims Act. The three objectives most often mentioned in the legislative history as rationales for the

> enumerated exceptions are: ensuring that "certain governmental activities" not be disrupted by threat of damages suites, avoiding exposure of the United States to liability for excessive or fraudulent claims, and not extending the coverage of the Act to suits for which adequate remedies were already available.

Kosak, 465 U.S. 858, 79 L. Ed. 2d at 870.

Then, commenting on the right to satisfy the judgment out of the Federal Treasury, this Court made a further observation on the legislative intent of § 2680(c) of the *FTCA*. As this Court stated:

> To a lesser extent, our reading of § 2680(c) is consistent with the third articulated purpose of the exceptions to the Tort Claims Act. At common law, a property owner had (and retains) a right to bring suit against an individual customs official who negligently damaged his goods. Title 28 U.S.C. § 2006 provides that judgments in such suits shall be paid out of the Federal Treasury if a court certifies that there existed probable cause for the detention of the goods and that the official was acting under the directions of an appropriate supervisor. Congress in 1946 may have concluded that this mode of obtaining recompense from the United States (or from an individual officer) was "adequate." To be sure, there are significant limitations to the common-law remedy, the most important of which is the apparent requirement that the plaintiff prove negligence on the part of a particular customs official. Such proof will often be difficult to come by. But Congress may well have concluded that exposing the United States to liability for injury to property in the custody of the Customs Service under

> circumstances in which the owner is not able to demonstrate such specific negligence would open the door to an excessive number of fraudulent suits.

Kosak, 465 U.S. 860, 79 L. Ed. 871-872.

Given the fact that a party was and is required to prove negligence of the individual United States Customs Officer, this Court indicated that preservation of that cause of action would not jeopardize the United States Government's ability to thwart far reaching, questionable claims from certain shippers. The concern had been vulnerability to fraudulent claims. By preserving the right which required the cargo owner to prove negligence of the United States Customs Officer, Congress was able to lessen the likelihood that fraudulent owners would pursue claims against United States Customs Officers.

II.

THIS COURT'S DECISION IN *UNITED STATES v. SMITH*, 499 U.S. 160 (1991), INTERPRETING THE *LIABILITY REFORM ACT*, DOES NOT INDICATE THAT CONGRESS INTENDED TO ELIMINATE EXISTING REMEDIES AGAINST UNITED STATES CUSTOMS OFFICERS.

Contrary to the Eleventh Circuit's opinion in this case, this Court's opinion in *United States v. Smith*, 499 U.S. 160 (1991), does not bar actions against United States Customs Officers. In *Smith*, this Court held that the *Liability Reform Act* barred a medical malpractice action against a U.S. Army physician whose alleged malpractice occurred in Italy. Unlike Petitioners in this case, however, the Plaintiff in *United States v. Smith* never had a viable cause of action against the individual treating physician. For pursuant to the *Gonzalez Act*, 10 U.S.C. § 1089, actions against military medical personnel were and are to

proceed against the U.S., not the individual. Thus, this Court's decision in *United States v. Smith* did not conflict with the *Liability Reform Act*'s legislative intent in that one of the purposes of the statute was to *preserve pre-existing remedies*.

In addition, this Court in *United States v. Smith*, recognized that the *Liability Reform Act* carved out two exceptions under which a party could still sue any individual government employee, 28 U.S.C. § 2679(b)(2)B. They were as follows:

Bivens actions and an action for violation of a federal statute that authorizes recovery against a Government employee. Although Petitioners' action in this case arguably arose in common law in the 1800's, it was and is now predicated upon two United States statutes which set forth a United States Customs' Officer's rights and responsibilities. First, 28 U.S.C. § 1499 creates the authorization for United States Customs Officers *to inspect goods*. Implicit in this obligation is a duty to exercise reasonable care. Second, as noted, 28 U.S.C. § 2006 permits a successful litigant in a case against a United States Customs Officer to collect its judgment through the United States Treasury Department.

Even if the *Liability Reform Act* could be interpreted to eliminate existing remedies, Petitioners' action fell within the exceptions created under 28 U.S.C. § 2679(b)(2)B. Given the fact that Petitioners' action arose from Respondent Zeigler's statutory right to inspect goods and his corresponding obligation to do so reasonably and responsibly, and given the statutory means to satisfy any judgment against him for his failure to act reasonably and responsibly, Petitioners' action still exists.

III.

THE ELEVENTH CIRCUIT COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S OPINION IN *GUTIERREZ DE MARTINEZ v. LAMAGNO*, 515 U.S. __, 132 L. Ed. 2d 375 (1995).

In *Gutierrez De Martinez v. Lamagno*, 515 U.S. __, 132 L. Ed. 2d 375 (1995), this Court again addressed application of the *Liability Reform Act*, and, in particular, the proper process for certification by the United States Attorney General. This Court noted that in the typical case, certification that the actions of a United States employee were within the scope of his/her employment requires the Plaintiff to proceed against the United States under the *FTCA*. However, addressing a factual setting similar to this case, which involves an exception to *FTCA*, this Court observed that the situation alters radically. In a footnote explaining the distinction, this Court noted as follows:

> Several of the *FTCA*'s 13 exceptions are for cases in which other compensatory regimes afford relief. *Kosak v. United States*, 465 U.S. 848, 858, 70 L. Ed. 2d 860, 104 S. Ct. 1519 (1984) (one rationale for exceptions is "not extending the coverage of the [FTCA] to suits for which adequate remedies were already available"). *See, e.g.*, § 2680 (excluding "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty"); § 2680(d) (excluding [a]ny claim for which a remedy is provided by the Public Vessels Act, relating to claims or suits in admiralty against the United States); § 2680(e) (excluding [a]ny claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading With the Enemy Act); 2 L. Jayson, Handling

> Federal Tort Claims: Administrative and Judicial Remedies 13-8, 13-25, 13-43, to 13-44 (1995) (explaining these exclusions as cases in which other remedies are available).

Gutierrez De Martinez, 132 L. Ed. 2d 385-386.

Referring to the opinion in *Kosak v. United States*, this Court was referring to the remedy in tort against the individual Customs Officer, not a remedy that arguably existed under the *Tucker Act*, 28 U.S.C. § 1491, as suggested by the Eleventh Circuit Court of Appeals in this case. For *Kosak* indicated clearly that the tort action existed. Based on the clear direction from this Court in *Gutierrez De Martinez*, the action against Respondent Zeigler has survived passage of the *Liability Reform Act*. Thus, the Eleventh Circuit Court of Appeals' opinion conflicts with the decisions of this Court.

CONCLUSION

In conclusion, it is clear that the Eleventh Circuit misinterpreted both the *Liability Reform Act* and the decisions of this Court. Because the issues of the right to seek redress against United States Customs Officers, and the application of the *Liability Reform Act* and *FTCA* are of important significance, Petitioners respectfully pray that this Court issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED OCTOBER 27, 1998

MATSUSHITA ELECTRIC COMPANY, Tokio Marine & Fire Insurance Company, Plaintiffs-Appellants,

v.

John ZEIGLER, Defendant-Appellee.

No. 97-9276.

United States Court of Appeals,
Eleventh Circuit.

Oct. 27, 1998.

* * *

Appeal from the United States District Court for the Northern District of Georgia.

Before ANDERSON and BARKETT, Circuit Judges, and RONEY, Senior Circuit Judge.

BARKETT, Circuit Judge:

Appellants Matsushita Electric Company and Tokio Marine and Fire Insurance Company (collectively "Matsushita") appeal from the district court's order substituting the United States as a defendant for John Zeigler, a U.S. Customs agent, and then dismissing Matsushita's claims against the United States under the Federal Tort Claims Act ("FTCA"). Matsushita claims that the district court erred in holding that its right to sue a customs inspector for negligence in handling its property was abrogated

by the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679. We affirm.

BACKGROUND

In April 1994, Matsushita imported a computer chip placement machine from Japan to Atlanta. The machine had been placed in a vacuum seal to protect it from the outside environment. When the machine reached Atlanta, U.S. Customs officers decided to conduct an inspection of the machine. Appellee John Zeigler inspected the machine and, in the course of his inspection, cut the vacuum seal. He did not do anything to reseal the machine. The machine was subsequently cleared for entry.

When the machine arrived at its final destination, rust had developed on the machine. The purchaser of the chip placement machine, OKI Telecom, rejected the machine as defective because of the rust. Subsequently, Matsushita filed this action against Zeigler and the Hartsfield Warehouse Company, at whose facility the machine was inspected.[1] After certifying that Zeigler was acting within the scope of his employment at the time of the events alleged in the suit, the United States moved to substitute itself for Zeigler and to dismiss the action. The district court granted the motion, entering final judgment dismissing the action. This appeal followed.

DISCUSSION

In *Kosak v. United States*, 465 U.S. 848, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984), the Supreme Court held that a property owner whose goods were damaged during their detention as a

1. Matsushita has settled its claim against the Hartsfield Warehouse. Accordingly, Hartsfield Warehouse is not a party to this appeal.

result of the negligence of Customs agents could not maintain an action against the United States under the FTCA. Although the FTCA provides that the United States shall be liable, to the same extent as a private party, "for injury or loss of property, . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," 28 U.S.C. § 1346(b), it exempts from coverage "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs or excise. . . ." 28 U.S.C. § 2680(c). The Supreme Court in *Kosak* construed this exemption broadly, reasoning that it covered "any claim 'arising out of' the detention of goods, and includes a claim resulting from negligent handling or storage of detained property." *Kosak*, 465 U.S. at 854, 104 S.Ct. 1519. Thus, under *Kosak*, Matsushita's suit cannot be maintained against the United States. The Court in *Kosak*, however, also stated that "[a]t common law, a property owner had (and retains) a right to bring suit against an individual customs official who negligently damaged his goods," *id.* at 860, 104 S.Ct. 1519, and that "Congress in 1946 may have concluded that this mode of obtaining recompense . . . was 'adequate.' " *Id.* at 861, 104 S.Ct. 1519.

As this suit is barred against the United States, the relevant question becomes whether the district court erred in holding that 28 U.S.C. § 2679 requires the substitution of the United States as a party defendant in place of the individual Customs officer, John Ziegler. Or, put another way, the issue is whether Matsushita's negligence remedy recognized in *Kosak* survives the passage in 1988 of the Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679.

In pertinent part, § 2679(b)(1) provides that the

> remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim. . . . Any other civil action . . . arising out of or relating to the same subject matter against the employee . . . is precluded without regard to when the act or omission occurred.

Congress provided two exceptions where § 2679(b)(1) would not apply: a civil action against a federal employee "(A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." § 2679(b)(2).

Further, § 2679(d)(1) directs that

> [u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action . . . commenced upon such a claim in a United States district court shall be deemed an action against the United States . . ., and the United States shall be substituted as the party defendant.[2]

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2. Upon certification and substitution of the United States as the party defendant, the action "shall proceed in the same manner as any (Cont'd)

On its face, the plain language of § 2679(b)(1) makes clear that where, as here, a federal employee acts within the scope of his or her employment, an individual can recover only against the United States, unless one of the two exceptions provided in § 2679(b)(2) is present.[3] Further, under § 2679(d)(1), the district court was *required* to substitute the United States as a defendant for Zeigler once the United States Attorney had certified that Ziegler's actions occurred within the scope of his employment.

Matsushita first argues that, notwithstanding its plain language, § 2679 should not be applied in a case in which the purported remedy would be illusory. If the United States is substituted in accordance with § 2679(d)(1), the case would then have to be dismissed pursuant to *Kosak*. Thus, Matsushita is left without a tort remedy for the negligence of Customs officials. Although we are sympathetic to Matsushita's concern, we must reject this argument in light of the plain meaning of § 2679's text and the decision of the Supreme Court in *United States v. Smith*, 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991).

In *Smith*, the plaintiff sued a physician from a United States Army hospital in Italy for medical malpractice. The United States was immunized from suit because the conduct occurred in a foreign country. *See* 28 U.S.C. § 2680(k). The Supreme Court held that the suit could not proceed against the individual federal employee, reasoning that § 2679 "makes the FTCA the

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action against the United States filed pursuant to [the FTCA] and shall be subject to the limitations and exceptions applicable to those actions." § 2679(d)(4).

3. We discuss below whether these exception are present here.

exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability." *Smith,* 499 U.S. at 166, 111 S.Ct. 1180. Pointing to the certification and substitution provisions in § 2679(d), the Court observed that "Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether." *Id.* Finally, the Court explained that "Congress' express creation of . . . two exceptions" in § 2679(b)(2) should not be expanded by "inferring a third exception that would preserve tort liability for Government employees when a suit is barred under the FTCA." *Id.* at 167, 111 S.Ct. 1180. *See also Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 427, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995) ("When the United States retains immunity from suit, certification disarms plaintiffs. They may not proceed against the United States, nor may they pursue the employee shielded by certification."); *Nadler v. Mann,* 951 F.2d 301, 304-05 (11th Cir.1992) (following *Smith*).

Matsushita attempts to distinguish *Smith,* arguing that the *Smith* Court did not interpret § 2679 to abrogate an existing common law right of action. In *Smith,* Matsushita suggests, there was no right to sue a military physician directly. *See* 10 U.S.C. § 1089(a) (providing that the exclusive remedy for torts committed by military personnel within the scope of their employment is suit against United States under the FTCA). However, this distinction, which apparently would preserve the right to sue federal employees directly for certain common law torts, cannot be squared with the broad and all-encompassing language of § 2679. *See Smith,* 499 U.S. at 173, 111 S.Ct. 1180 (noting that "[§ 2679(b)(1)] states that, with respect to a tort committed by '*any* employee of the government' within the

scope of employment, the FTCA provides the exclusive remedy") (emphasis in original). Moreover, the Court in *Smith* rejected the suggestion, made by Justice Stevens in dissent, that § 2679 was meant to preserve pre-existing tort remedies. As Justice Marshall's opinion for the Court explained,

> The truth is, however, that the legislative history reveals considerably less solicitude for tort plaintiffs' rights than the dissent suggests. . . . [T]he House Report expressly warned that, under the Liability Reform Act, "*any* claim against the government that is precluded by [FTCA] exceptions" — which obviously would include claims barred by the exception for causes of action arising [from the detention of goods by customs agents] — "also is precluded against an employee." The congressional intent was clearly implemented in [§ 2679(b)(1)] of the Act, and we are obliged to give it effect.

Smith, 499 U.S. at 175, 111 S.Ct. 1180 (quoting H.R. Rep. 100-700 at 6, 1988 U.S.C.C.A.N. at 5950) (emphasis in original).[4]

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4. Matsushita also suggests that the Court's decision in *Gutierrez de Martinez* supports its claim that § 2679 does not bar its negligence claim against Zeigler. In *Gutierrez de Martinez*, the Supreme Court held that the Attorney General's certification that a federal employee acted within the scope of his or her employment is reviewable by the federal courts. *Gutierrez de Martinez*, 515 U.S. at 423-37, 115 S.Ct. 2227. The Court pointed out that where the United States is shielded from liability by an FTCA exception, certification bars suit against both the United States and the individual employee, creating a heightened need for federal court review of certification decisions. *Id.* at 427, 115 S.Ct. 2227. Although the Court noted in passing that some of the FTCA's exemptions

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Matsushita next argues that its claim against Zeigler falls within the above-quoted exception to § 2679 contained in § 2679(b)(2)(B). Matsushita maintains both that the exception applies because Zeigler was given the authority to inspect and detain Matsushita's goods under 19 U.S.C. § 1499 and implicit in this authority was the obligation to exercise due care, and because 28 U.S.C.§ 2006 authorizes the federal treasury to pay out a judgment against a revenue officer if there was probable cause for the detention of goods and the employee was acting under directions of his or her supervisor.

We find no merit to these arguments. Matsushita's claim was not "brought for a violation of a statute of the United States under which such action against an individual is authorized." § 2679(b)(2). The right to sue a customs agent for damage to goods caused by negligence during the detention of goods, the Court in *Kosak* explained, derives from the common law rather than any statute. *Kosak*, 465 U.S. at 860, 104 S.Ct. 1519. The statutes cited by Matsushita do not counsel a different conclusion. Nothing in § 1499 creates any rights in individuals; rather, it is simply an authorization of power to Customs officials to inspect and detain property. Ziegler's duty of care cannot be found in § 1499, but arises instead from common

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"are for cases in which other compensatory regimes afford relief," *id.* at 427 n. 5, 115 S.Ct. 2227, the Court did not suggest, let alone hold, that the common-law negligence action recognized in *Kosak* survived the enactment of § 2679. It simply pointed out that, where, as here, the government retained immunity under a FTCA exemption, plaintiffs were not necessarily left without any remedy. Indeed, in *Kosak*, the Court noted that a property owner might be able to recover against the United States for damage to property caused by Customs officials under the Tucker Act. *See Kosak*, 465 U.S. at 860 n. 22, 104 S.Ct. 1519.

law negligence principles. Likewise, § 2006 does not create a statutory right of any kind, but only provides for payment of judgments for violation of rights existing under the common law or other federal law. Because neither § 1499 nor § 2006 create any individual rights, Zeigler's actions could not have violated these statutes. *See Smith*, 499 U.S. at 175, 111 S.Ct. 1180 (finding the exception in § 2679(b)(2) inapplicable where the federal statute "does not impose any duties of care . . . that could be violated"). Rather, the only right which Zeigler may have violated was Matsushita's common law right recognized in *Kosak*.

Applying the statutory framework created by Congress, the district court in this case properly substituted the United States for Ziegler and dismissed this action against the United States under the FTCA exception provided in § 2680(c). Although Matsushita's claim that it should not be denied a remedy for the alleged negligence of Customs officials in this case has great force, "it is properly addressed to Congress, not to this Court." *Kosak*, 465 U.S. at 862, 104 S.Ct. 1519. Congress expressed its intent in the plain language of § 2679 and we are obliged to give it effect. Accordingly, the judgment of the district court must be AFFIRMED.

APPENDIX B — TARIFF ACT OF 1930, 19 U.S.C. § 1499 (1970)

§ 1499. Examination of merchandise

Imported merchandise, required by law or regulations made in pursuance thereof to be inspected, examined, or appraised, shall not be delivered from customs custody, except under such bond or other security as may be prescribed by the Secretary of the Treasury to assure compliance with all applicable laws, regulations, and instructions which the Secretary of the Treasury or the Customs Service is authorized to enforce until it has been inspected, examined, or appraised and is reported by the appropriate customs officer to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States. Such officer shall designate the packages or quantities covered by any invoice or entry which are to be opened and examined for the purpose of appraisement or otherwise and shall order such packages or quantities to be sent to the public stores or other places for such purpose. Not less than one package of every invoice and not less than one package of every ten packages of merchandise, shall be so designated unless the Secretary of the Treasury, from the character and description of the merchandise, is of the opinion that the examination of a less proportion of packages will amply protect the revenue and by special regulation or instruction, the application of which may be restricted to one or more individual ports or to one or more importations or one or more classes of merchandise, permit a less number of packages to be examined. All such special

regulations shall be published in the weekly Treasury Decisions within fifteen days after issuance and before the liquidation of any entries affected thereby. Such officer may require such additional packages or quantities as he may deem necessary. If any package contains any article not specified in the invoice and, in the opinion of the appropriate customs officer, such article was omitted from the invoice with fraudulent intent on the part of the seller, shipper, owner, or agent, the contents of the entire package in which such article is found shall be subject to seizure, but if no such fraudulent intent is apparent, then the value of said article shall be added to the entry and the duties thereon paid accordingly. If a deficiency is found in quantity, weight, or measure in the examination of any package, report thereof shall be made to the appropriate customs officer, who shall make allowance therefor in the liquidation of duties.

No appraisement made after the effective date of the Customs Administrative Act of 1938 shall be held invalid on the ground that the required number of packages or the required quantity of the merchandise was not designated for examination or, if designated, was not actually examined, unless the party claiming such invalidity shall establish that merchandise in the packages or quantities not designated for examination, or not actually examined, was different from that actually examined and that the difference was such as to establish the incorrectness of the appraisement; and then only as to the merchandise for which the appraisement is shown to be incorrect.

Appendix B

June 17, 1930, c. 497, Title IV, § 499, 46 Stat. 728; June 25, 1938, c. 679, §§ 15, 16(a), 52 Stat. 1084; June 2, 1970, Pub.L. 91-271, Title III, § 301(k), 84 Stat. 289.

* * *

APPENDIX C — THE UNITED STATES AS DEFENDANT, 28 U.S.C. § 1346

* * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

APPENDIX D — EXECUTION AGAINST REVENUE OFFICER, 28 U.S.C. § 2006

§ 2006. Execution against revenue officer

Execution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts, or for the recovery of any money exacted by or paid to him and subsequently paid into the Treasury, in performing his official duties, if the court certifies that:

(1) probable cause existed; or

(2) the officer acted under the directions of the Secretary of the Treasury or other proper Government officer.

When such certificate has been issued, the amount of the judgment shall be paid out of the proper appropriation by the Treasury.

(June 25, 1948, c. 646, 62 Stat. 960.)

APPENDIX E — TORT CLAIMS PROCEDURE ACT, 28 U.S.C. § 2679

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government —

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding

pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2) or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to these actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if —

> **(A)** the claim would have been timely had it been filed on the date the underlying civil action was commenced, and
>
> **(B)** the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

(June 25, 1948, c. 646, 62 Stat. 984; Sept. 21, 1961, Pub.L. 87-258, § 1, 75 Stat. 539; July 18, 1966, Pub.L. 89-506, § 5(a), 80 Stat. 307; Nov. 18, 1988, Pub.L. 100-694, §§ 5, 6, 102 Stat. 4564.)

APPENDIX F — TORT CLAIMS PROCEDURE ACT, 28 U.S.C. § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not each statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

(June 25, 1948, c. 646, 62 Stat. 984; July 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1039, §§ 2(a)(2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub.L. 86-168, Title II, § 202(b), 73 Stat. 389; Mar. 16, 1974, Pub.L. 93-253, § 2, 88 Stat. 50.)